No. 15-1251

SUPREME COURT, U.S.
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In The
Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

SW GENERAL, INC., doing business as SOUTHWEST AMBULANCE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF *AMICUS CURIAE* SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Section 3345(b)(1) of the Federal Vacancies Reform Act, 5 U.S.C. § 3345, *et seq.*, limits when a permanent nominee for a vacant office may also serve temporarily as the acting official. The question presented is whether that limitation applies to all temporary officials serving under 5 U.S.C. § 3345(a), or whether it is irrelevant to officials who assume acting responsibilities under Subsections (a)(2) and (a)(3).

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INTEREST OF *AMICUS CURIAE*[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national non-profit, public interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. SLF drafts legislative models, educates the public on key policy issues, regularly files *amicus curiae* briefs with this Court in cases such as *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), and litigates regularly before the Supreme Court, including such cases as *Utility Air Regulation Group, et al. v. EPA*, 134 S. Ct. 2427 (2014).

SLF's direct interest in this case stems from its profound commitment to protecting America's legal heritage. That heritage includes the separation of powers enshrined in the Constitution, which is a vital component of the Nation's laws and a critical safeguard of political liberty. This case concerns a separation of powers violation by the President and thus implicates one of SLF's core concerns.

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[1] All parties have consented to the filing of this brief by blanket or individual letter. *See* Sup. Ct. R. 37.3(a). No counsel for a party has authored this brief in whole or in part, and no person other than *amicus curiae*, its members, and its counsel has made monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

SUMMARY OF ARGUMENT

The vast expanse of the administrative state is an undeniable reality of modern American life. "The administrative state wields vast power and touches almost every aspect of daily life." *City of Arlington v. FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting) (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010)). It is no secret that "as a practical matter [agencies] exercise legislative power, by promulgating regulations with the force of law; executive power, by policing compliance with those regulations; and judicial power, by adjudicating enforcement actions and imposing sanctions on those found to have violated their rules." *Id.* at 1877-78.

It is this very concentration of power that drew the ire and deep concern of the Founders, because "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . may justly be pronounced the very definition of tyranny." The Federalist No. 47, at 298 (James Madison) (Clinton Rossiter ed., 1999). "The leading Framers of our Constitution viewed the principle of separation of powers as the central guarantee of a just government." *Freytag v. Comm'r*, 501 U.S. 868, 870 (1991).

Accordingly, the Framers put masterfully crafted safeguards in place to allow each branch to jealously guard its duties and prerogatives. One such power that was the subject of great concern during the Constitutional Convention of 1787 was the appointment power.

Some Delegates favored vesting the power in the President; others favored Congress. So opposed were these parties that the matter, even after lengthy debate, went unresolved for months. Madison Debates September 15, The Avalon Project: Documents in Law, History and Diplomacy, Yale Law School Lillian Goldman Law Library, http://avalon.law.yale.edu/18th_century/debates_915.asp (last visited Sept. 20, 2016). The controversy was not resolved until the Convention's end when the Framers devised a compromise: they vested the appointment power for principal federal officers in the President and Senate jointly, and they allowed Congress alone the power to decide how inferior officers are appointed. *Id.*

In the instant case, it is the reason for those boundaries that is implicated. "The Framers understood, however, that by limiting the appointment power, they could ensure that those who wielded it were *accountable to political force and the will of the people*." *Freytag*, 501 U.S at 884 (emphasis added). In the modern era, it is the Federal Vacancies Reform Act (FVRA), 5 U.S.C. § 3345, *et seq.*, that has preserved the Senate's role through clear and articulable standards for when the chamber needs to approve of the person serving as an acting appointee. But the past three presidents have, regardless of whether by manipulative intent or mere ignorance, circumnavigated the requirements of the statute. Pet. Br. at 13.

Those individuals who have served and are currently serving in violation of the FVRA were and are acting in positions of great authority with massive

amounts of power, but with no accountability to the legislative branch. Acting officials previously and currently serving in violation of the FVRA exercise vast civil and criminal prosecutorial discretion, wield great power over large sectors of the U.S. economy and trade, implement the Executive's domestic policy agenda, regulate energy and the environment, and even control decision-making power in foreign policy and national security.

These positions and appointments are not mere cogs in the administrative machine. On the contrary, and by the government's own admission, Pet. Br. at 16, these are extremely high-ranking positions, often times the second in command for executive agencies, branches of the military, and entire cabinet departments. The individuals in these positions have power over and are responsible for a huge amount of the administrative arm's actual, day-to-day operation. The fact that they serve without any check on their authority goes against not only the Framers' intent, but also runs counter to the modern statute enacted to preserve that intent.

ARGUMENT

I. Preserving the separation of powers through our system of checks and balances is a constitutional necessity.

Preservation of the separation of powers was a foremost goal of the Framers in crafting the Constitution. As James Madison clearly articulated, "the preservation of liberty requires that the three great departments of power should be separate and distinct." The Federalist No. 47, at 297 (James Madison) (Clinton Rossiter ed., 1999). And the Framers should know – they crafted a system clearly and intentionally contrary to that of the British government; its system operates to this day by the fusion of powers. *See, e.g., id.* at 299 (describing the British Constitution, where the three branches "are by no means totally separate and distinct from each other").

The American system is one of checks and balances. As opposed to a system in which the branches would be entirely isolated, the Framers opted for a system that does allow for a necessary degree of flexibility. *See Mistretta v. United States*, 488 U.S. 361, 380 (1989) ("[T]he Framers did not require – and indeed rejected – the notion that the three Branches must be entirely separate and distinct."). In articulating his approach, Madison clarified that it did not conflict with Montesquieu, whose tenets underscored major components of the Constitution. Madison explained:

> [Montesquieu] did not mean that these departments ought to have no *partial agency* in,

> or no *control* over, the acts of each other. His meaning . . . can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted.

The Federalist No. 47, at 299. The boundaries on this flexibility, however, are undeniable. "In adopting this flexible understanding . . we simply have recognized Madison's teaching that the greatest security against tyranny – the accumulation of excessive authority in a single Branch – lies not in a hermetic division among the Branches, but in a carefully crafted system of checked and balanced power within each Branch." *Mistretta*, 488 U.S. at 381. *See also Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure Case)*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (articulating that "[the Constitution] enjoins upon its branches separateness but interdependence, autonomy but reciprocity"). Stated succinctly: "[T]he Constitution diffuses power the better to secure liberty." *Morrison v. Olsen*, 487 U.S. 654, 694 (1988) (internal quotations omitted).

A. The Senate's advice and consent of executive appointments is a critical component of separation of powers.

One such check on the accumulation of excessive authority in either the Executive or the Legislature is the Appointments Clause. Article II, Section 2, Clause 2 of the Constitution provides that the President "shall

nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States." U.S. Const. art. II, § 2, cl. 2. *See also* The Federalist No. 67, at 408 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (explaining that the only exception to this duality is the President's recess appointment power, Hamilton noted that "[t]he ordinary power of appointment is confined to the President and Senate *jointly*. . .").

Indeed, the Framers knew this to be a power rife with the ability for overreach and corruption. "The manipulation of official appointments had long been one of the American revolutionary generation's greatest grievances against executive power, because the power of appointment to offices was deemed the most insidious and powerful weapon of eighteenth century despotism." *Freytag*, 501 U.S. at 883 (internal quotations and citation omitted). The record from the Constitutional Convention of 1787 "indicates the Framers' determination to limit the distribution of the power of appointment." *Id.* at 884. Therefore,

> The roots of the separation-of-powers concept embedded in the Appointments Clause are structural and political. Our separation-of-powers jurisprudence generally focuses on the danger of one branch's aggrandizing its power at the expense of another branch. The Appointments Clause not only guards against this encroachment but also preserves another

> aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power.

Id. at 878 (internal citation omitted).

The separation of powers enshrined in the Constitution's treatment of federal appointments – through the checks and balances provided by the Senate's advice and consent power – is an integral part of that safeguard. As this Court has explained, "the Appointments Clause of Article II is more than a matter of 'etiquette or protocol'; it is among the significant structural safeguards of the constitutional scheme." *Edmond v. United States*, 520 U.S. 651, 659 (1997) (quoting *Buckley v. Valeo*, 424 U.S. 1, 125 (1976)).

The Senate's role in confirming nominees through its advice and consent "serves both to curb executive abuses of the appointment power, and to promote a judicious choice of [persons] for filling the offices of the union." *Id.* (citations and quotations omitted). Indeed, this Court as recently as 2014 has recognized the importance of this role of the appointment power.

> The Federalist Papers make clear that the Founders intended this method of appointment, requiring Senate approval, to be the norm [T]he need to secure Senate approval provides "an excellent check upon a spirit of favoritism in the President, and would tend greatly to preventing the appointment of unfit characters from State prejudice,

> from family connection, from personal attachment, or from a view to popularity."

NLRB v. Noel Canning, 134 S. Ct. 2550, 2558-59 (2014) (quoting The Federalist No. 76, at 513 (Alexander Hamilton) (Jacob Cooke ed., 1961)). In other words, one purpose of the Senate's role in confirmation is to curb the President's bias, *whether subconscious or intentional* and for whatever reason it might exist, in staffing his cabinet, agencies, federal courts, and the like. Over 60 years ago, in the *Steel Seizure Case*, Members of the Court warned that the "accretion of dangerous power" is spawned by "unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority." *Steel Seizure Case*, 343 U.S. at 594 (Frankfurter, J., concurring).

The reasoning behind this logical check on the appointment power makes perfect sense. As Hamilton explained:

> The blame of a bad nomination would fall upon the President singly and absolutely. The censure of rejecting a good one would lie entirely at the door of the Senate, aggravated by the consideration of their having counteracted the good intentions of the executive. If an ill appointment should be made, the executive, for nominating, and the Senate, for approving, would participate, though in different degrees, in the opprobrium and disgrace.

The Federalist No. 77, at 459-60 (Alexander Hamilton) (Clinton Rossiter ed., 1999). It is this accountability to,

ultimately, the democratic process[2] that underlies the intent of the balance of power, and this integral safeguard must be guarded closely so that it shall indeed continue to outlive Hamilton in the present day.[3]

In the modern era, this check is more relevant than ever before. "[T]he authority administrative agencies now hold over our economic, social, and political activities," *City of Arlington*, 133 S. Ct. at 1878, stands in stark contrast to the government of enumerated powers the Framers envisioned. Our Founding Fathers sought to create a government structure limited in nature – as James Madison explained in an effort to ease concerns that the proposed national government would usurp the People's power to govern themselves: "The powers delegated by the proposed Constitution to the federal government are few and defined. . . . [and] will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce . . . ." The Federalist No. 45, at 289 (James Madison) (Clinton Rossiter ed., 1999). Today's wide-reaching "'administrative state with its reams of regulations would leave [the Founders] rubbing their eyes.'" *City of Arlington*, 133 S. Ct. at 1878 (quoting

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[2] Before the passage of the Seventeenth Amendment allowing the direct election of senators, however, the original Hamiltonian accountability directly to the voter would have been more attenuated. U.S. Const. art. I, § 3, cl. 1, *amended by* U.S. Const. amend. XVII.

[3] "God help me and forgive me, I wanna build something that's gonna outlive me." Lin-Manuel Miranda: Hamilton: Original Broadway Cast Recording (Atlantic Records 2015).

Alden v. Maine, 527 U.S. 706, 807 (1999) (Souter, J., dissenting)). As time marches on, the administrative state becomes larger yet. "[I]n the last 15 years, Congress has launched more than 50 new agencies. And more are on the way." *Id.* (citation omitted). "It would be a bit much to describe the result as the very definition of tyranny, but the danger posed by the growing power of the administrative state cannot be dismissed." *Id.* at 1879 (internal citation omitted).

Though the growth of the administrative state in and of itself may not exactly be "the very definition of tyranny," the lack of accountability of those who staff some of its most prominent positions surely warrants use of the term. Truly, "[l]iberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring). *See id.* at 447 (opinion for the Court) (striking down the line-item veto as unconstitutional because it "gives the President the unilateral power to change the text of duly enacted statutes"). The growth of government coupled with the lack of accountability for those who run it creates a clear and present danger to the constitutional structure and the liberty it guarantees.

B. The Appointments Clause does not exist to serve the Executive's sole interest or convenience.

One crux of the government's argument is that their favored construction of the FVRA should be approved because "[e]very President since the FVRA's enactment has made nominations of persons serving in an acting capacity . . . in accordance with that construction." Pet. Br. at 15. *See also* Pet. at 26 ("The court of appeals' decision is . . contrary to settled . . . practice. . . ."). In other words, the government would have this Court believe that just because everybody's doing it, it must be not only okay, but constitutional. The government also asks this Court to decide in favor of its convoluted interpretation based on what would happen at "a practical level" if additional agency actions were to be called into question. Pet. at 27.

Language again in *Freytag* speaks to this very situation: "Because it articulates a limiting principle, the Appointments Clause does not always serve the Executive's interest." 501 U.S. at 880. Simply because the Executive has been acting for its purported convenience – and simply because vacancy statutes to and through the present day allow for some exercise of the appointment power temporarily in recognizing the need to keep the government running when individuals step down or cannot serve – does not mean that it

meets the requirements of the FVRA or the Appointments Clause in doing so.[4] The government fears a "significant impediment to the ability of any President . to temporarily fill important posts in the Executive Branch with the persons whom *the President* deems most qualified to *fill them permanently*." Pet. at 11 (emphasis added). *See also Buckley*, 424 U.S. at 121 ("The Senate is a participant in the appointive process by virtue of its authority to refuse to confirm persons nominated to office by the President."). But this determination is not for the President to say – it is the Senate who has the final word, and the Senate indeed was intended to pose such an impediment for the President in determining who should permanently serve.

The government's attitude flies in the face of the proper vision of the role of the Executive. For example, in striking down the President's executive order directing the Secretary of Commerce to seize major steel mills to prevent a labor shutdown during the Korean War, the Court invoked the most apropos first principles: "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Steel Seizure Case*, 343 U.S. at 587. *See Clinton*, 524 U.S. at 449 (Kennedy, J., concurring) ("The Constitution's structure requires a stability which transcends

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[4] In fact, "[l]egislative action may indeed often be cumbersome, time-consuming, and apparently inefficient[,]" *Steel Seizure Case*, 343 U.S. at 629 (Douglas, J., concurring), but the Framers of the Constitution intended as much. Such inconveniences do not warrant policies that subvert the separation of powers.

the convenience of the moment."). This hearkens back to that same pesky, original concern of the concentration of more than one type of power in the same hands. When the President appoints those who execute legislative functions through regulations without a check from the legislative branch itself, the result is what Madison, Montesquieu, and this Court warned of: tyranny.

Likewise, some would interpret Hamilton's legacy in advocating for and securing a singular, energetic executive as cause for somehow eschewing the role that the Senate is meant to play in advice and consent.[5] It is well settled and uncontested that "assistants or deputies of the Chief Magistrate" certainly "derive their offices from his appointment, at least from his nomination. . . ." The Federalist No. 72, at 434 (Alexander Hamilton) (Clinton Rossiter ed., 1999). *See also Myers v. United States*, 272 U.S. 52, 117 (1926) ("[T]he President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates."). Yet this underlying truth behind the daily functions of the administrative state does not excuse a violation of separation of powers when Congress, in enacting the FVRA, allowed multiple options for filling vacancies. The Executive will not be hamstrung if the FVRA is interpreted by its plain language. The only "deleterious consequences for policymaking. ."[6]

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[5] *See generally* Br. of *Amicus Curiae* Constitutional Accountability Center.

[6] Other *Amici* also imply that the intent behind the Recess Appointments clause, U.S. Const. art. II, § 2, cl. 3, which, as this

Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. Cal. L. Rev. 913, 937 (2009), are those agency actions such as the instant case where the Executive, by its own fault for failing to follow the requirements set out in the FVRA, may potentially be held invalid. These are consequences of the Executive's own making, not of the Statute's, and cementing the proper statutory interpretation will ensure that any upheaval does not happen in the future, as it has in this case because of the Executive's faulty interpretation.

Lastly, any attempt to justify the flawed interpretation of the FVRA simply because the Senate has acquiesced to the Executive's misunderstanding and misuse should be disregarded. *See* Pet. Br. at 13-14 (internal citation omitted) ("There have been more than 100 such nominees in the 18-year history of the FVRA . . . [a]nd nominees serving on the basis of the Executive's longstanding interpretation have been routinely confirmed by the Senate."). Of course, as this Court is well aware, "[s]ince the separation of powers exists for the protection of individual liberty, its vitality 'does not

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Court knows, allows the President to fill positions while the Senate is in recess, is proper support for the government's interpretation of the FVRA. *See* Br. of *Amicus Curiae* Constitutional Accountability Center at 9. But unlike recess appointments, where without the so-named clause the President would lack substantial power, the FVRA gives multiple avenues for the President to staff positions when vacancies arise. The circuit court's proper interpretation of the Statute leaves the President with multiple, ample options, and his ability in staffing executive branch positions is not "undermined." *Id.* at 10.

depend' on 'whether the encroached-upon branch approves the encroachment.'" *Noel Canning*, 134 S. Ct. at 2593 (Scalia, J., concurring) (quoting *Free Enter. Fund*, 130 S. Ct. at 3155). If this were not the case, any longstanding constitutional principle could be worn away in one term of Congress. Surely this is also tyranny by another name.

C. To preserve the separation of powers principles provided by the Appointments Clause, this Court should affirm the lower court's decision.

The above discussion demonstrates the critical importance of this Court's role in preserving and in this case restoring the careful balance of powers among and between the branches. "[A]s to the particular divisions of power that the Constitution does in fact draw, we are without authority to alter them, and indeed we are empowered to act in particular cases to prevent any other Branch from undertaking to alter them." *Pub. Citizen v. United States Dep't of Justice*, 491 U.S. 440, 487 (1989). *See Noel Canning*, 134 S. Ct. at 2593 (Scalia, J., concurring) (noting that "policing the 'enduring structure' of constitutional government when the political branches fail to do so is 'one of the most vital functions of this Court'") (quoting *Pub. Citizen*, 491 U.S. at 468 (Kennedy, J., concurring in the judgment)). Such an alteration is what the Executive has done affirmatively in this case,[7] but the Senate, too, in

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[7] *See Freytag*, 501 U.S. at 879-80 (rejecting the argument that the Court should defer to the Executive's view that there has been

failing to act also passively undermined this division of power. Indeed, *Amicus* asks this Court to decide this pivotal separation of powers case in light of its importance to our constitutional structure and the preservation of liberty.

In keeping with this Court's direction for "high walls and clear distinctions" to preserve the separation of powers, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995), Congress enacted the FVRA, which sets forth easily applied, bright-line rules. The purpose of the separation of powers is "not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." *Steel Seizure Case*, 343 U.S. at 613-14 (quoting *Myers*, 272 U.S. at 240, 293). As Justice Jackson stressed, any presidential claim to power "at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." *Id.* at 638 (Jackson, J., concurring). It is in this scrutiny that this Court is well suited and handily equipped to exercise its most essential calling. Preserving the separation of powers is the ultimate role of this Court.

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no encroachment of the separation of powers in an Appointments Clause challenge).

II. Appointees serving in violation of the FVRA have access to shocking amounts of power and control with no check on uses of that power.

The individuals listed in the government's detailed table, Pet. Br. App. A, have access to and exercise far-reaching powers over not only the operation of the federal government, but also the military, foreign policy, and even entire sectors of the economy. Their appointments to these posts in violation of the FVRA are not symptoms of only one political party or agenda; Presidents Clinton, Bush, and Obama have all kept appointees in their posts after they became ineligible to serve upon their nomination. *See generally* Pet. Br. App. A.

The FVRA goes one step beyond the constitutional baseline of the Senate's advice and consent role because it accounts for the danger of allowing a political appointee to become the perpetual nominee, continuing to serve during the often lengthy nomination process (and after it even though the Senate has expressed its disapproval of the nominee with a return of the nomination to the President). In fact, in the instant case, the President was so bold as to nominate the same individual not once,[8] but twice, and then keep

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[8] Congress.gov Nominations, https://www.congress.gov/nomination/112th-congress/86?q=%7B%22search%22%3A%5B%22Lafe+Solomon%22%5D%7D&resultIndex=2 (last visited Sept. 20, 2016).

that individual in place despite the fact that the Senate rejected the nomination on both occasions.[9] The continued service of any appointee in this situation completely nullifies the Senate's clearly articulated role in the confirmation of appointees through advice and consent.

Though the instant case may present one of the most egregious examples, its value goes beyond demonstrating the particular harms to Respondent in this case. It serves to bring attention to other, similarly situated current and previous acting appointees and the amounts of power and discretion they have previously controlled and currently control.

A. Appointees who have served and are serving in violation of the FVRA exercise prosecutorial discretion.

The Attorney General is the chief prosecutor of the United States Government. 28 U.S.C. § 503. In that role, the Attorney General not only brings criminal and civil claims against those who have violated federal law, but also advises the President, 28 U.S.C. § 511, advises the heads of executive departments, 28 U.S.C. § 512, and advises secretaries of the different branches of the military. 28 U.S.C. § 513.

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[9] In the second instance, the President withdrew the nomination after months of inaction by the Senate. *See* Congress.gov Nominations, https://www.congress.gov/nomination/113th-congress/506?q=%7B%22search%22%3A%5B%22Lafe+Solomon%22%5D%7D&resultIndex=1 (last visited Sept. 20, 2016).

The Attorney General serves with the advice and consent of the Senate. Thankfully, no Attorney General has served in violation of the FVRA. However, since 1998, twenty-one high-ranking prosecutors in the Department of Justice have served or are currently serving in violation of the FVRA. *See generally* Pet. Br. App. A. These appointees include eleven Assistant Attorneys General, three Associate Attorneys General, and three Deputy Attorneys General, along with other directors of various departments of the Justice Department. *Id.*

The fact that Deputy Attorneys General have served and currently serve in violation of the FVRA is especially troubling. This position is the second-in-command to the Attorney General.[10] In fact, in the day-to-day operations of the Department of Justice, the Deputy Attorney General steers many important decisions and influences the Attorney General. Some of the duties of the Deputy include but are not limited to the following: authorize searches and electronic surveillance, review and recommend on whether the Attorney General should seek the death penalty in appropriate cases, recommend pardons and commutations to the White House, and exercise all powers granted to the Attorney General unless explicitly stated that the power is to be reserved to the Attorney General solely. Organization, Mission & Functions Manual, *supra* note 10.

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[10] Organization, Mission & Functions Manual: Attorney General, Deputy and Associate, https://www.justice.gov/jmd/organization-mission-and-functions-manual-attorney-general (last visited Sept. 20, 2016).

Therefore, the Deputy Attorney General has a vast amount of prosecutorial discretion, and controls the fate of whether some individuals will live or die. It is no wonder that this position, when established, called for the advice and consent of the Senate in confirming the individual who would serve. 28 U.S.C. § 504. Regardless of choices made by individuals serving in violation of the FVRA, simply the access to such power and potential for abuse is damning enough. It is the job of the law to ask, "what if?" Regarding prosecutors, "what if" means that the lives of defendants hang in the balance. When appointees serve in a manner that side-steps the system of checks and balances, there is no political accountability to either the Executive or the Legislature. As demonstrated by the instant case, even though the Senate twice rejected Mr. Solomon's nomination,[11] the President allowed Mr. Solomon to remain at his post; the government now claims a skewed interpretation of the FVRA to support that action. What more was the Senate to do? Surely they cannot be held politically accountable, but the President seeks to eschew accountability as well. It is clear that the responsibilities, though extensive, of Mr. Solomon pale in comparison to those of a Deputy Attorney General, who has the power to recommend (if not decide) whether individuals should live or die. The potential for abuse is grave, and this Court should act to protect the balance of power.

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[11] Congress.gov Nominations, https://www.congress.gov/nomination/113th-congress/506?q=%7B%22search%22%3A%5B%22Lafe+Solomon%22%5D%7D&resultIndex=1 (last visited Sept. 20, 2016).

Even those in posts junior to the Deputy Attorney General bear immense amounts of prosecutorial discretion. The case of one Assistant Attorney General is especially insightful. In 2008, Matthew Friedrich was appointed acting Assistant Attorney General for the criminal division. Pet. Br. App. A at 54a. Under Friedrich's tenure and leadership, Senator Ted Stevens was prosecuted for felony ethics charges and convicted.[12] However, in what has been referred to as a "shocking and disturbing" case of prosecutorial misconduct,[13] the Senator was acquitted after it was discovered that the attorneys directly under Friedrich, one of whom was specifically placed on the case by him, worked with witnesses whom the attorneys knew falsified testimony. Wilbur, *supra* note 13. Friedrich was deeply involved with the trial.[14] *See generally In re Special Proceedings*, 842 F. Supp. 2d 232 (D.D.C. 2012). Critics have claimed he bore a great deal of responsibility in the proceedings.[15]

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[12] Del Quentin Wilber, *Stevens Found Guilty on 7 Counts*, Washington Post, Oct. 28, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/10/27/AR2008102700289.html.

[13] Del Quentin Wilbur, *Judge Orders Probe of Attorneys in Stevens Case*, Washington Post, April 8, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/04/07/AR2009040700338.html.

[14] *Justice for Ted Stevens*, The Wall Street Journal, Feb. 20, 2009, http://www.wsj.com/articles/SB123509358392428915; NPR, *Report: Prosecutors Hid Evidence In Ted Stevens Case*, March 15, 2012, http://www.npr.org/2012/03/15/148687717/report-prosecutors-hid-evidence-in-ted-stevens-case.

[15] Erin Fuchs, *The Tragic Story Of A Lawyer Who Killed Himself After A Botched Prosecution*, Business Insider, May 19, 2014, http://www.businessinsider.com/sidney-powell-on-nicholas-marsh-and-ted-stevens-2014-5.

Even though Friedrich was never held accountable, the damage was already done to Senator Stevens, who lost his reelection bid.[16] Is it any wonder, then, that the Senate refused to confirm Friedrich to his post?[17] Even if an acting official is not directly responsible for the life or death of an individual, in this case, Friedrich was responsible for the livelihood and eventual disgrace of one of the nation's longest serving and most decorated senators. The powers held by attorneys general at every level in the Department of Justice cannot be overstated. Especially at a time when "overcriminalization" and questions regarding the power granted to prosecutors[18] are at the forefront of the criminal justice reform movement, the Senate's advice and consent role in approving the nation's top prosecutors is more critical than ever.

B. Appointees who have served and are serving in violation of the FVRA are responsible for national defense and shape foreign policy.

Since 1998, at least twenty-one high-ranking officials throughout the military, Department of Defense,

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[16] Paul Kane, *Sen. Ted Stevens Loses Reelection Bid*, Washington Post, Nov. 19, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/11/18/AR2008111803227.html.

[17] Congress.gov Nominations, https://www.congress.gov/nomination/110th-congress/2205?q=%7B%22search%22%3A%5B%22Matthew+Friedrich%3A%22%5D%7D&resultIndex=1 (last visited Sept. 20, 2016).

[18] *See generally, e.g.*, *Pottawattamie Cty. v. McGhee*, 558 U.S. 1103 (2010) (dismissed pursuant to Sup. Ct. R. 46); *Yates v. United States*, 135 S. Ct. 1074 (2015).

Department of State, and related sub-agencies and departments have served in violation of the FVRA. *See generally* Pet. Br. App. A. Individuals in these positions not only exercise great amounts of authority over the protection of our nation, but they also have access to top secret information.

For instance, the Deputy Director of the Central Intelligence Agency[19] assists the Director in carrying out the duties and responsibilities of that office. 50 U.S.C. § 3037(a). However, the Deputy Director is automatically selected as the acting Director if for any reason the Director is unable to serve. 50 U.S.C. § 3037(b). Therefore, this second in command post has immense power. The Director's powers include: a blanket ability to collect, correlate, evaluate, and disseminate "intelligence" generally – a blanket grant of power, 50 U.S.C. § 3036(d)(1)-(2); control the United States' undercover operations around the world, 50 U.S.C. § 3036(d)(3); terminate, at his discretion, *any* officer or employee of the CIA, 50 U.S.C. § 3036(e); and finally, "coordinate the relationships between the intelligence community and . . . foreign governments or international organizations on all matters involving intelligence related to the national security or involving intelligence acquired through clandestine means." 50 U.S.C. § 3036(f). Clearly, the powers granted to the Director of the CIA are at least extensive, and the Deputy Director may assist in any of these matters. A person with so much power, especially when exercises of

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[19] *See* Pet. Br. App. A at 7a, record of John McLaughlin's service as Acting Deputy Director of Central Intelligence.

such power are often out of view of the media and the public, must be carefully selected and insulated from political whims. Without Senate advice and consent, this cannot otherwise be ensured.

Another instance of a position with unfettered access to highly classified information is that of the Inspector General of the Department of Defense.[20] Since the FVRA was passed, five inspectors general in various departments have served in violation of it. *See generally* Pet. Br. App. A. The general powers of Inspectors General do bear mention briefly. Inspectors General have the power to audit within their own offices, 5 U.S.C. § 4(a)(1), as well as the ability to advise on legislation and regulations and department policies generally. 5 U.S.C. § 4(a)(2)-(3). But Inspectors General also have the power to recommend prosecution to the Attorney General, 5 U.S.C. § 4(d), in what could be called diluted prosecutorial discretion, and in gathering the information needed to make such a recommendation, have almost unfettered power to investigate. 5 U.S.C. § 6(a).

This great power is an excellent tool when an Inspector General can be a check on the department or administrative agency in question, and when the Inspector General has an appropriate check placed on her; that is, the confirmation process required by the statute. 5 U.S.C. § 3. However, when the Inspector General is unchecked, she has the power to upend the

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[20] *See* Pet. Br. App. A at 56a, record of Gordon S. Heddell's service as Acting Inspector General, Department of Defense.

entire office under her inspection by: unfettered access to all "material available to the applicable establishment. . . ." 5 U.S.C. § 6(a)(1); to make any investigation deemed by the Inspector General as "necessary or desirable," 5 U.S.C. § 6(a)(2); and in sum, have the ability to appoint an entire investigative staff and obtain any information from any individual in the appropriate department. 5 U.S.C. § 6(a)(4)-(7).

Arguably the most powerful Inspector General of all is that of the Department of Defense, if solely because of the sensitive information to which access is required to engage in the investigations required of the office. Congress has in fact recognized this concern, and accordingly, enacted 5 U.S.C. § 8, which limits the abilities of the Inspector General of the Department of Defense. Congress gave the Secretary of Defense the power to limit the Inspector General's access to any information of which the disclosure would constitute a "serious threat to national security." 5 U.S.C. § 8(b)(1). However, upon further thought, this check is not much of a safeguard. No Secretary of Defense has served in violation of the FVRA. However, as is the case with other departments, Deputy Secretaries have served in violation of the FVRA. *See generally* Pet. Br. App. A. And as is the case with other Deputies, the Deputy Secretary of Defense is second in command to the cabinet post and exercises duties as proscribed by the Secretary. 10 U.S.C. § 132(b)-(d). Accordingly, an Inspector General serving in violation of the FVRA may well be accountable to a Deputy Secretary serving in violation of the FVRA. The Senate's important check over an

entire cabinet department is substantially minimized, and the exercise of power is unencumbered when the FVRA is violated.

C. Appointees who have served and are serving in violation of the FVRA are responsible for diverse areas of domestic policy and exercise control over entire sectors of the economy.

Individuals who have previously served and are currently serving in violation of the FVRA implement the Executive's agenda in many diverse ways. Not dissimilar from the examples above, a dozen Deputy Secretaries of entire cabinet departments have served improperly. They range from the Deputy Secretary of Energy to the Deputy Secretary of Education to the Deputy Secretary of Labor to the Deputy Secretary of Health and Human Services to the Deputy Secretary of Commerce; the list goes on. *See generally* Pet. Br. App. A. Appointees have even included the President of the Export-Import Bank, the Commissioner of the Food and Drug Administration, the Administrator of the National Highway Traffic Safety Administration, and multiple top-level administrators in the Environmental Protection Agency (EPA). *Id.*

One seemingly innocuous example of a position filled improperly under the FVRA is the Assistant Secretary of the Department of Housing and Urban Development (HUD), Federal Housing Administration

(FHA) Commissioner (a singular role).[21] In this position, Carol J. Galante "had direct responsibility for oversight and administration of the FHA's trillion dollar insurance portfolio, which includes single family and multifamily housing. . . "[22] According to the Legislature's records, she was nominated in October of 2011 and confirmed in December of 2012.[23] Therefore, she served for over a year during "the worst financial crisis since the Great Depression . . . [,]" Carol Galante Biography, without any check by the Senate in violation of the FVRA. In fact, while she was at the helm, the FHA requested and required financial assistance for the first time in its 79-year history to the tune of $1.7 billion taxpayer dollars.[24] Additionally, the FHA "doesn't have to ask Congress for money because it has what is known as 'permanent and indefinite' budget authority, allowing it to tap the Treasury."[25] Therefore, the singular power over an entire sector of the economy fell into

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[21] *See* Pet. Br. App. A at 62a, record of Carol J. Galante's service as Acting Assistant Secretary of Housing and Urban Development (Federal Housing Commissioner).

[22] Carol Galante Biography, UC Berkeley Faculty Directory, http://ced.berkeley.edu/ced/faculty-staff/carol-galante (last visited Sept. 20, 2016).

[23] Congress.gov Nominations, https://www.congress.gov/nomination/112th-congress/1064?q=%7B%22search%22%3A%5B%22Carol+J.+Galante%22%5D%7D&resultIndex=1 (last visited Sept. 20, 2016).

[24] Joe Light, *Top Obama Housing Official Carol Galante to Step Down*, The Wall Street Journal, Aug. 11, 2014, http://www.wsj.com/articles/SB10001424052702304526204579101142224548428.

[25] Nick Timiraos, *FHA Will Require $1.7 Billion From Treasury*, The Wall Street Journal, Sept. 27, 2013, http://www.wsj.com/articles/SB10001424052702304526204579101142224548428.

the hands of one individual who served for over a year with no check from the Senate. The decisionmaking power and authority exercised by any person in this position should never be unchecked, especially given the unrestricted access to Treasury coffers. However, as the housing market, including federal lending, stumbled out of the recession on the backs of taxpayers, the person in control was not at all accountable to the democratic process.

Similarly, one role that seems perfectly routine at first blush is that of the Director of the Office of Personnel Management (OPM).[26] However, the federal government is "the Nation's largest employer,"[27] and the Director of the OPM is at the helm of the government's human resources department. Pursuant to 5 U.S.C. § 1103(c)(2), the Director promulgates regulations to control the hiring and firing throughout the federal government. Again, serving with no Senate check in violation of the FVRA, the Director of the OPM is just one of many examples wherein one person has control over a vast sector of the economy.

Perhaps the most damning powers exercised, however, are the powers to regulate. Individuals serving in violation of the FVRA are often proscribed by statute the power to craft regulations, and arguably those

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[26] *See* Pet. Br. App. A at 57a, record of Michael W. Hager's service as Acting Director of OPM; *see* Pet. Br. App. A at 81a, record of Beth F. Cobert's service as Acting Director of OPM.

[27] Federal Employers, United States Department of Labor, https://www.dol.gov/odep/topics/federalemployment.htm (last visited Sept. 20, 2016).

regulations promulgated by the EPA affect the most Americans every single day. The EPA's power to regulate and enforce its regulations is wide-reaching.[28] The Deputy Administrator of the EPA is the second in command in the agency's structure.[29] As this Court is well aware, the EPA's regulations are frequently a topic of litigation in courts around the country, including this Court. *See, e.g., Util. Air Regulation Grp.*, 134 S. Ct. 2427 (2014) (finding the EPA's greenhouse gas regulations unconstitutional); *Rapanos v. United States*, 547 U.S. 715, 725 (2006) (plurality opinion) (rejecting the EPA's expansive definition of Waters of the United States). The constitutionality of many EPA actions are at best murky, and as the agency debuted its new regulations surrounding the Waters of the United States interpretations of the Clean Water Rule, the issues of unregulated authority are again at the forefront as the Sixth Circuit stayed enforcement of the new rule. *Ohio v. United States Army Corps of Eng'rs*, 803 F.3d 804 (6th Cir. 2015) (ordering a stay of the implementation of the EPA's new regulations redefining Waters of the United States). Not only do these regulations risk running aground of constitutional authority, but high-level

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[28] *See* Reorganization Plan No. 3 of 1970, 84 Stat. 2086-89, https://www.gpo.gov/fdsys/pkg/STATUTE-84/pdf/STATUTE-84-Pg2086.pdf (last visited Sept. 20, 2016).

[29] *See* Pet. Br. App. A at 74a, record of Albert Stanley Meiburg's service as Acting Deputy Administrator of the EPA; *see generally* About the Office of the Administrator, U.S. Environmental Protection Agency, https://www.epa.gov/aboutepa/about-office-administrator (last visited Sept. 20, 2016).

actors promulgating and implementing these regulations serve unconstitutionally as it is. Again, with no political accountability, the power to regulate and enforce through judicial actions against U.S. citizens and residents is a dangerous power, and as the EPA continues its fight to expand its regulatory sphere through the promulgation of the new, troubled Clean Water Rule, the Senate's check on those individuals appointed to positions of great power and leadership within the EPA is more important than ever.

In sum, the doctrine of separation of powers is the antithesis of serving any one branch's interest. Power is easy to accumulate; throughout this Court's jurisprudence, it is limiting the accumulation of power that has proven far more difficult. In the instant case, Congress has already erected clear boundaries in the FVRA on what the Executive may and may not do; the statutory language is clear and unambiguous. The lack of enforcement of those boundaries does not make them any less existent, valid, or pointedly relevant as Executive power continues its exponential growth in the modern administrative state.

CONCLUSION

For the reasons stated in the Respondent's Brief and this *amicus* brief, this Court should affirm the

decision of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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